
(2005) 02 DEL CK 0002

In the Delhi High Court

Case No : Criminal Appeal No. 535 of 2001

Bhogi Chaudhary and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 01-02-2005

Acts Referred:

Citation : (2005) 117 DLT 250 : (2005) 79 DRJ 693

Hon'ble Judges : R.S. Sodhi, J;Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : Rajiv Awasthi, amices Curia, for the Appellant; Ravinder Chadha, APP and Jagdish Pershad, for the Respondent

Judgement

Mukundakam Sharma, J.—This appeal is filed by the three appellants and is directed against the judgment dated 9th July, 2001 and the order of sentence dated 10th July, 2001 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No.72/2000 whereby the learned trial court has convicted all the appellants u/s 302/365/201/120(b) and sentenced them to undergo life imprisonment u/s 302 IPC and also to undergo imprisonment for different periods under other sections with further direction that all the sentences shall run concurrently and also to pay fine.

2. The prosecution case, in brief, is that a case was registered on the complaint lodged by Dev Kumar, brother-in-law, of deceased Dinesh Mehto, who was examined in the trial as PW-3. He alleged in the first information report that his brother in law Dinesh Mehto along with Pramod Kumar and Bhogi Chaudhary were residing together in House No.87/2, Jamrood Pur, Delhi, as tenants. Shibu and another brother of Bhogi Chaudhary also came from village to the house where Bhogi Chaudhary was staying and they were residing in the said house along with the said three persons. It was also alleged that on 1.7.98 a theft took place in the aforesaid room where all the aforesaid three persons together with Shibu and the other brother were residing and articles of Dinesh Mehto, Pramod Kumar and Bhogi Chaudhary were stolen for which Dinesh Mehto started

accusing both Pramod Kumar and Bhogi Chaudhary. As Dinesh Mehto was found missing after 18th July, 1998, a missing report was lodged by said Dev Kumar on 26th July, 1998 and in the said report he had cited the names of Bhogi Chaudhary and his brother Shibu as suspects. On receipt of the aforesaid information, a case being FIR No.307/98 was registered and thereafter police started investigation. After completion of the investigation the police filed a charge sheet as against the aforesaid three appellants and also against Ravi Kumar. However, Ravi Kumar could not be arrested by the police and thereafter he was declared as a proclaimed offender. Thereafter, charges were read over to the three accused, who pleaded not guilty to the charge and claimed for trial.

3. During the trial, prosecution examined, in all, 13 witnesses, including the Doctor, PW-2, who had performed the post mortem examination on the body of deceased Dinesh Mehto. After recording the evidence of the prosecution witnesses the learned trial court heard the arguments of the counsel appearing for the parties and thereafter passed the impugned judgment and order of conviction and sentence.

4. Being aggrieved by the same the present appeal was filed. Since the appellants were unrepresented, we appointed Mr. Rajiv Awasthi as the amicus curiae for all the three accused/appellants. We have heard him as also the learned Additional Public Prosecutor, who have taken us through the evidence on record. It is disclosed from the records that the learned trial court has passed the order of conviction and sentence relying on the evidence of PW-1, PW-3, PW-5, PW-6 and PW-11. Reference is also made in the judgment to the disclosure statements of Bhogi Chaudhary, appellant No.1 herein, dated 15th January, 1999 and 18th January, 1999. PW-1 is Pramod Kumar, who used to reside along with Bhogi Chaudhary and the deceased Dinesh Mehto and shared the same room. In his deposition he referred to the incident that had taken place on the night intervening 30th June/1st July, 1998 when a theft was committed in their room. It is stated by him that Bhogi Chaudhary suspected him and Dinesh Mehto for the aforesaid incident of theft and openly declared that he would not leave them. He has also stated in his evidence that after 18th July, 1998 he did not see Bhogi Chaudhary, Shiv Kumar @ Shibu Kamat and his cousin brother Ram Subiki and, Therefore, he had suspected that they had abducted Dinesh Mehto, the deceased, since they had threatened. He also stated that on 18th July, 1998 he met Bhogi Chaudhary at M-Block Market, Greater Kailash-I, New Delhi at about 8.30 P.M when he came out from his shop from the back shutter. He also stated that he did not accompany Bhogi Chaudhary despite his request, stating that his duty hours were not yet over. Later in the night he again met Bhogi Chaudhary and they travelled together. The said witness was cross-examined at length. He has admitted in his cross-examination that briefcase of the accused/appellant Bhogi Chaudhary was also stolen but he was not aware of the contents of the said briefcase. Although in his examination he has stated that Shiv Kumar, brother of Bhogi Chaudhary, had come to Delhi and stayed with Bhogi Chaudhary but in the cross examination he has stated that he did not know that Shiv Kumar

was residing at Bombay.

5. Reliance is also placed on the evidence of PW-3, Dev Kumar Shah, who is the informant in the present case, by the learned trial court as also the learned Additional Public Prosecutor, appearing for the State. We have perused his evidence very minutely. On scrutiny thereof we find that whatever he had stated about the incident of theft, the same is only hearsay as he has admitted that he had heard about the incident from Pramod Kumar and Dinesh Mehto. He has stated that since Dinesh Mehto was not available and present, Therefore, he had lodged the said missing report to the police. He had also stated that he had accompanied the police party to Bombay and identified the dead body recovered by the police as that of Dinesh Mehto by looking at the photographs which were taken by the police after recovery of the dead body, which are Ex.P.1 and P.2, as the dead body was already cremated by the Mumbai Police before their arrival at Mumbai.

6. The Doctor who had performed the post mortem was examined as PW-2. He has stated that he had performed the said post mortem on the dead body on 7th August, 1998. In the cross-examination he has stated that it could not be definitely ascertained as to how much time the body remained in water after or before death. He, however, categorically stated that death had occurred approximately about 48 hours before the body was received at the post mortem centre. He had also stated that the body and the face of the dead body were swollen and there was difference in the dead body and his photograph. After looking at the photographs Ext. P-1 and P-2 of the dead body, he stated that from the original dead body the identity of the person could be ascertained but not from the photographs.

7. So far the disclosure statements dated 15th January, 1999 and 18th January, 1999 are concerned, on which reliance is placed by the learned trial court, no such reliance could be placed on the said disclosure statements as the said disclosure statements did not lead to any recovery and , Therefore, cannot be treated as a fact leading to the disclosure which is admissible u/s 27 of the Indian Evidence Act. Besides, the said statements contradict each other on material points. PW-5 was examined by the prosecution to prove recovery of the dead body. He had stated that before cremating the dead body recovered, as there was no claimant, photographs of the dead were taken which he proved as Ext.P-1 and P-2. He also stated that the Informant came to Bombay along with the Delhi Police party only on 20th January, 1999 but by then the dead body was cremated. He admitted that the face of the dead body was decomposed and that there was no identification mark or sign on the photographs. PW-6 only stated that he knew Dinesh (the deceased) and Bhogi and that he saw them in the N Block Market on 18th July, 1998 at about 7.30/8.30 P.M. He stated in his cross-examination that he did not know about any dispute between Bhogi and Dinesh. PW-11, on the other hand, stated that he saw Dinesh, Pramod and Bhogi on 18th July 1998 at 7.30 P.M. at Jamrood Pur. He was, however, declared hostile by the

prosecution. These witnesses were examined by the prosecution to prove that they had seen Dinesh last with Bhogi. But there is apparent contradiction between the statements of PW-6 and PW-11 as, according to them, they had seen Bhogi and Dinesh at the same time but at two different places. They are also in the nature of chance witnesses. PW-11 was declared hostile by the prosecution. The case of the prosecution is that Dinesh was murdered at Bombay. But there is no evidence on record to show that Bhogi had also gone to Bombay. He was arrested from Delhi. No independent and reliable evidence is brought on record to show and prove that Bhogi was not in Delhi till he was arrested in Delhi. Therefore, no guilt could be fastened on any of the appellants on the basis of the aforesaid evidence of PW-5, PW-6 and PW-11.

8. We have also been shown the photographs of the dead body, which were taken by the police at the time of recovery of the body. It is an admitted position that the dead body was cremated before it could be identified by anybody. PW-3 identified the dead body as that of Dinesh by looking only at the photographs Ext. PW-1 and PW-2. The said photographs are of a naked person with the face totally disfigured and decomposed. The Doctor, who has conducted the post mortem on the dead body of the deceased, has categorically stated in his cross-examination that the body could not have been identified from the photographs. Therefore, we are of the opinion that it was not possible for PW-3 to identify the dead body by looking at the photographs alone particularly when the face was swollen and decomposed.

9. We have carefully analysed the evidence on record and on scrutiny thereof, we are of the considered opinion that there is no evidence on record which could substantiate and prove the charges that have been made out against the appellants herein. In our considered opinion, suspicion cannot take the place of proof. There is no evidence on record to prove and establish or to show that Bhogi Chaudhary, at any point of time, had gone to Bombay. The Investigating Officer also even did not ask the employer of the deceased as to whether or not the deceased had attended his office after 18th July, 1998. He even did not record the statement of the employer of the deceased in order to ascertain as to whether or not Dinesh Mehto had attended his office after 18th July, 1998.

10. There is admittedly no eye witness to the crime and reliance is placed by the learned trial court only on the circumstantial evidence. Therefore, after going through the records and upon hearing the learned amicus curiae and the learned Additional Public Prosecutor, appearing for the State, we are of the considered opinion that there is no incriminating evidence available on record which would justify the conviction and sentence of the appellants herein. The police examined Pramod and other witnesses immediately after registration of the First Information Report. Pramod was residing with Shibu, one of the appellants, in the room and knew that he resides in Bombay. Even despite that the police never sought to interrogate or arrest Shibu in Bombay till January 1999. The circumstantial evidence sought to be led by the prosecution is devoid of the

necessary chain of events which conclusively lead to the guilt of the appellants. None of the aforesaid circumstances lead to the conclusion that the crime was committed by the accused appellants. Even the recovery of dead body of Dinesh is doubtful and it cannot be conclusively and firmly held that the said dead body is of Dinesh.

11. In the facts and circumstances of this case, we set aside the judgment and order of conviction and sentence and acquit all the three accused persons/ appellants, who have filed this appeal. They shall be set at liberty forthwith, if they are not wanted in any other case. A copy of this order be sent to the Jail authorities for information and a copy be also given dusty to the learned amices curiae as also the learned Additional Public Prosecutor.

12. We also appreciate the assistance provided by Mr. Rajiv Awasthi, who was appointed as the amices curiae, as also by the learned Additional Public Prosecutor, appearing for the State at the time of hearing of the appeal.